Supreme Court, U.S.
FILED
MAR 5 2015
OFFICE OF THE CLERK

Nos. 14-556, 14-562, 14-571 & 14-574

IN THE
Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL., PETITIONERS,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL., PETITIONERS,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

AMICUS BRIEF OF THE AMERICAN HUMANIST ASSOCIATION AND CENTER FOR INQUIRY IN SUPPORT OF PETITIONERS

MONICA L. MILLER
AMERICAN HUMANIST ASSOCIATION
1777 T Street N.W.
Washington, D.C. 20009
(202) 238-9088
mmiller@americanhumanist.org

ELIZABETH L. HILEMAN
Counsel of Record
HILEMAN & ASSOCIATES, P.C
7979 Old Georgetown Rd, #600
Bethesda, Maryland 20814
(301) 652-1488
ehileman@hilemanlaw.com

[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DAVID A NIOSE
AMERICAN HUMANIST ASSOCIATION
1777 T Street N.W.
Washington, D.C. 20009
(202) 238-9088
dniose@americanhumanist.org

EDWARD TABASH
CENTER FOR INQUIRY
433 North Camden Drive, Suite 600
Beverly Hills, CA 90210
(310) 279-5120
etabash@centerforinquiry.net

NICHOLAS LITTLE
CENTER FOR INQUIRY
1020 19th St. NW, Suite 425
Washington, DC 20036
(202) 629-2403
nlittle@centerforinquiry.net

Attorneys for Amici Curiae

March 5, 2015

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE EQUAL PROTECTION CLAUSE REQUIRES STATES TO LICENSE A MARRIAGE BETWEEN SAME-SEX COUPLES	3
A. Laws that discriminate on the basis of sexual orientation create a suspect classification requiring strict judicial scrutiny	4
B. Laws that impinge upon the fundamental right to marry must be subject to strict scrutiny	5
C. There is no legitimate state interest, compelling or otherwise, that justifies the denial of same-sex couples the fundamental right to marry	7
II. TRADITIONAL AND RELIGIOUS MORALITY CANNOT BE USED TO JUSTIFY INVIDIOUS DISCRIMINATION AGAINST SAME-SEX COUPLES	10
A. Religious morality and traditions are invalid state interests	10

TABLE OF CONTENTS—Continued

Page

B. Preventing harm may be a moral value, but it is the prevention of harm itself that is a proper motivation for legislation, not any underlying religious morality 21

C. The Sixth Circuit's reliance on Town of Greece is misplaced, as legislative prayer is a sui generis category of Establishment Clause jurisprudence that has no applicability to other situations 23

III. THE FOURTEENTH AMENDMENT REQUIRES STATES TO RECOGNIZE A MARRIAGE BETWEEN SAME-SEX COUPLES LAWFULLY LICENSED OUT-OF-STATE 32

CONCLUSION 34

APPENDIX

APPENDIX A: IDENTIFICATION OF *AMICI CURIAE* 1a

TABLE OF AUTHORITIES

CASES	Page(s)
ACLU v. Rabun Cnty. Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983)	30-31
ACLU of Ohio Found., Inc. v. Ashbrook, 375 F.3d 484 (6th Cir. 2004)	28
Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682 (D. Utah 1991)	26
Atheists of Fla., Inc. v. City of Lakeland, 713 F.3d 577 (11th Cir. 2013)	25
Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971)	19
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)	22
Baskin v. Bogan, 12 F. Supp. 3d 1144 (S.D. Ind. 2014)	7
Bats v. Cobb Cnty., 410 F. Supp. 2d 1324 (N.D. Ga. 2006)	26
Bellotti v. Baird, 443 U.S. 622 (1979)	7
Bethel School Dis. No. 403 v. Fraser, 478 U.S. 675 (1986)	22
Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y 1988)	27
Bob Jones Univ. v. United States, 461 U.S. 574 (1983)	13
Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014)	6

TABLE OF AUTHORITIES—Continued

Page(s)

Bowers v. Hardwick,
478 U.S. 186 (1986)..... 20

Brown v. Bd. of Educ.,
347 U.S. 483 (1954)..... 29, 32

Cammack v. Waihee,
932 F.2d 765 (9th Cir. 1991)..... 28

Card v. City of Everett,
520 F.3d 1009 (9th Cir. 2008)..... 26, 27

Carpenter v. City & Cnty. of San Francisco, 93 F.3d 627 (9th Cir. 1996)..... 30

Carter v. Broadlawns Medical Center,
857 F.2d 448 (8th Cir. 1988)..... 29

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985)..... 8

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000)..... 22

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986)..... 22

Cohen v. California,
403 U.S. 15 (1971)..... 22

Coles by Coles v. Cleveland Bd. of Educ.,
171 F.3d 369, 376, 379 (6th Cir. 1999)..... 26, 27

County of Allegheny v. ACLU,
492 U.S. 573 (1989)..... 24, 25, 30

Crowley v. Christensen,
137 U.S. 86 (1890)..... 21

TABLE OF AUTHORITIES—Continued

Page(s)

Davis v. Beason,
133 U.S. 333 (1890)..... 21

DeBoer v. Snyder,
772 F. 3d 388 (6th Cir. 2014).....*passim*

DeBoer v. Snyder,
973 F.Supp.2d 757 (E.D. Mich. 2014) 8, 9

Doe v. Indian River Sch. Dist.,
653 F.3d 256, 259 (3d Cir. 2011) 26, 27

Doe v. Tangipahoa Parish Sch. Bd.,
631 F. Supp. 2d 823 (E.D. La. 2009) 26

Edwards v. Aguillard,
482 U.S. 578 (1987)..... 25

Ellis v. La Mesa,
990 F.2d 1518 (9th Cir. 1993)..... 30, 32

Epperson v. Arkansas,
393 U.S. 97 (1968)..... 17

Estin v. Estin,
334 U.S. 541 (1948)..... 21

Everson v. Bd. of Ed. of Ewing Twp.,
330 U.S. 1 (1947)..... 24

Friedman v. Board of Cnty. Commissioners,
781 F.2d 777 (10th Cir. 1985)..... 30

Frontiero v. Richardson,
411 U.S. 677 (1973)..... 5

Glassroth v. Moore,
229 F. Supp. 2d 1290 (M.D. Ala. 2002) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Glassroth v. Moore,
335 F.3d 1282 (11th Cir. 2003)..... 28, 31

Golinski v. OPM,
824 F. Supp. 2d 968 (N.D. Cal. 2012)..... 6

Gonzales v. North Township of Lake Cnty.,
4 F.3d 1412 (7th Cir. 1993)..... 31

Goodridge v. Dep't of Public Health,
440 Mass. 309 (2003) 9

Graham v. Central Comm. Sch. Dist.,
608 F. Supp. 531 (S.D. Iowa 1985)..... 28

Harris v. Zion,
927 F.2d 1401 (7th Cir. 1991)..... 30

Heller v. Doe,
509 U.S. 312 (1993)..... 8, 10

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994)..... 32

Jager v. Douglas County Sch. Dist.,
862 F.2d 824 (11th Cir. 1989)..... 26, 28-29

Jewish War Veterans v. United States,
695 F. Supp. 3 (D.D.C. 1988)..... 27, 28

Jones v. Hamilton Cnty.,
891 F. Supp. 2d 870 (D. Tenn. 2012)..... 28

Joyner v. Forsyth County,
653 F.3d 341 (4th Cir. 2011)..... 25

Katcoff v. Marsh,
755 F.2d 223 (2d Cir. 1985) 26

Kerrigan v. Comm'r of Pub. Health,
289 Conn. 135 (2008). 5, 6, 20

TABLE OF AUTHORITIES—Continued

Page(s)

Kitchen v. Herbert,
755 F.3d 1193 (10th Cir. 2014) 6

Lawrence v. Texas,
539 U.S. 558 (2003).....*passim*

Lee v. Weisman,
505 U.S. 577 (1992)..... 28

Lemon v. Kurtzman,
403 U.S. 602 (1971)..... 24, 25, 26, 27, 28

Loving v. Virginia,
388 U.S. 1 (1967).....*passim*

Lundberg v. West Monona Comm. Sch. Dist.,
731 F. Supp. 331 (N.D. Iowa 1989) 26-27

Marsh v. Chambers,
463 U.S. 783 (1983).....*passim*

Mass. Bd. of Retirement v. Murgia,
427 U.S. 307 (1976)..... 7

Maynard v. Hill,
125 U.S.190 (1888)..... 6

McCreary Cnty. v. ACLU,
545 U.S. 844 (2005)..... 27

McDonald v. Chicago,
561 U.S. 742 (2010)..... 33

Mellen v. Bunting,
327 F.3d 355 (4th Cir. 2003)..... 28

Metzl v. Leininger,
850 F. Supp. 740 (N.D. Ill. 1994)..... 26, 27

TABLE OF AUTHORITIES—Continued

Page(s)

Meyer v. Nebraska,
262 U.S. 390 (1923) 6

Miss. Univ. Women v. Hogan,
458 U.S. 718 (1982) 10

North Carolina Civil Liberties Union Legal Found. v. Constangy,
947 F.2d 1145 (4th Cir. 1991) 28

Pelphrey v. Cobb Cnty.,
547 F.3d 1263 (11th Cir. 2008) 26

Perry v. Brown,
671 F. 3d 1052 (9th Cir. 2012) 8

Phalen v. Commonwealth of Virginia,
49 U.S. 163 (1850) 21

Pitts v. City of Kankakee,
267 F.3d 592 (7th Cir. 2001) 31

Plyler v. Doe,
457 U.S. 202 (1982) 4, 7, 8

Posadas de Puerto Rice Associates v. Tourism Co. of Puerto Rico,
478 U.S. 328 (1986) 21

Robinson v. City of Edmond, 68 F.3d 1226
(10th Cir. 1995) 30

Rubin v. City of Lancaster,
710 F.3d 1087 (9th Cir. 2013) 27

Santa Fe v. Doe,
530 U.S. 290 (2000) 28

Scott v. Sandford,
60 U.S. 393 (1857) 29

TABLE OF AUTHORITIES—Continued

Page(s)

Searcy v. Strange,
2015 U.S. Dist Lexis 7776 (S.D. Al. Jan. 23, 2015) 18

Simpson v. Chesterfield County Bd. of Supervisors,
404 F.3d 276 (4th Cir. 2005) 25, 27

Slaughter-House Cases,
83 U.S. 36 (1873) 33

Snyder v. Murray City Corp.,
159 F.3d 1227 (10th Cir. 1998) 25, 27

Town of Greece v. Galloway,
134 S. Ct. 1811 (2014) ..... *passim*

Trunk v. City of San Diego,
629 F.3d 1099 (9th Cir. 2011) 30

Turner v. Safley,
482 U.S. 78 (1987) 6

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 23

United States v. Virginia,
518 U.S. 515 (1996) 33

United States v. Windsor,
570 U.S. ___ (2013), 133 S. Ct. 2675 (2013) 4, 6, 10, 33

Varnum v. Brien,
763 N.W.2d 862 (Iowa 2009) 4

Wallace v. Jaffree,
472 U.S. 38 (1985) 28

TABLE OF AUTHORITIES—Continued

Page(s)

Walz v. Tax Commission,
397 U.S. 664 (1970) 30

Warner v. Orange County Dep't of Prob.,
115 F.3d 1068 (2d Cir. 1997) 28

Washegesic v. Bloomingdale Pub. Sch.,
813 F. Supp. 559 (W.D. Mich. 1993),
aff'd 33 F.3d 679 (6th Cir. 1994) 31

Watson v Memphis,
373 U.S. 526 (1963) 9

Weisman v. Lee,
908 F.2d 1090 (1st Cir. 1990) 26

West Chester & P.R. Co. v. Miles,
55 Pa. 209 (Pa. 1867) 12-13

West Virginia Bd. of Ed. v. Barnette,
319 U.S. 624 (1943) 3

Wynne v. Town of Great Falls,
376 F.3d 292, 302 (4th Cir. 2004) 28

Wynne v. Town of Great Falls,
2003 U.S. Dist. LEXIS 21009 (D.S.C.
2003) 26, 27

Young v. Am. Mini Theatres, Inc.,
427 U.S. 50 (1976) 22

Zablocki v. Redhail,
434 U.S. 374 (1978) 5, 6

TABLE OF AUTHORITIES—Continued

CONSTITUTION Page(s)

U.S. Const. amend. I .....*passim*

U.S. Const. amend. XIV, § 1. .....*passim*

U.S. Const. art. IV, §. 2 33

COURT FILINGS

Brief for the Coalition of Black Pastors From Detroit, Outstate Michigan, and Ohio as Amici Curiae, *DeBoer v. Snyder*, 772 F. 3d 388 (6th Cir. 2014)..... 17-18

Brief for the National Coalition of Evangelicals *et al.* as Amici Curiae, *DeBoer v. Snyder*, 772 F. 3d 388 (6th Cir. 2014)..... 18

OTHER AUTHORITIES

Ross Barnett, Segregationist, Dies; Governor of Mississippi in 1960's, N.Y. Times, Nov. 7, 1987, *available at* http://www.nytimescom/1987/11/07/obituaries/ross-barnett-segregationist-dies-governor-of-mississippi-in-1960-s.html (last visited Feb. 24, 2015) 14

Alan Blinder, *Alabama Judge Defies Gay Marriage Law*, N.Y. Times, Feb. 8, 2015, *available at* http://www.nytimes.com/2015/02/09/us/gay-marriage-set-to-begin-in-alabama-amid-protest.html?_r=0 (last visited Feb 26, 2015..... 18

TABLE OF AUTHORITIES—Continued

Page(s)

S. Michael Craven, *No-Fault Divorce is Institutionalized Evil*, Christian Post Sept. 11, 2009, available at http://www.christianpost.com/news/no-fault-divorce-is-institutionalized-evil-40822/ (last visited Feb, 24, 2015) 16

Michael Curtis, *A Unique Religious Exemption From Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those who Discriminate Against Married or Marrying Gays in Context*, 188 WAKE FOREST L. REV. 173 (2012) 14, 15

David Edwards, *Roy Moore: If Supreme Court changes God's 'Organic Law' on marriage 'I would not be bound thereby,'* Feb, 15, 2015, *available at* http://www.rawstory.com/rs/2015/02/roy-moore-if-supreme-court-changes-gods-organic-law-on-marriage-i-would-not-be-bound-thereby (last visited Feb. 24, 2015) 18

Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083 (1996) 32

Family Research Council, Vision and Mission Statements, *available at* http://www.frc.org/mission-statement (last visited March 2, 2015) 17

TABLE OF AUTHORITIES—Continued

Page(s)

GAO, D. Shah, *Defense of Marriage Act: Update to Prior Report 1* (GAO–04–353R, 2004) 33

Jill Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000) 15

Bob Jones, Sr., *Is Segregation Scriptural?*, Radio Address at Bob Jones University, Apr. 17, 1960, *available at* https://docs.google.com/a/centerforinquiry.net/file/d/0B6A7PtfmRgT7Q1kzZEVXUThMLWc/edit (last visited Feb. 24, 2015) 13-14

LGBTQNation Staff Reports: *Civil laws on same-sex marriage must comport with God's law*, Nov. 5, 2011, *available at* http://www.lgbtqnation.com/2011/11/santorum-civil-laws-on-same-sex-marriage-must-comport-with-gods-law/ (last visited Feb, 24, 2015) 19

Mason I. Lowance, *A House Divided: The Antebellum Slavery Debates in America, 1776-1865* (2003) 11

Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 Cal. L. Rev. 293 (1993) 29

TABLE OF AUTHORITIES—Continued

Page(s)

Gary Stern, *Two Christian Groups Oppose No-Fault Divorce*, The Journal News, June 17, 2010, *available at* http://religion.lohudblogs.com/2010/06/17/two-christian-groups-oppose-no-fault-divorce/ (last visited Feb. 24, 2015)..... 15-16

The Bible:

Ephesians 6:5 11

Genesis 9:25 12

Genesis 19:1-11 16

Leviticus 20:13 16

Leviticus 25:44-46 11

1 Timothy 2:12 15

INTERESTS OF *AMICI CURIAE*[1]

This *amici curiae* brief in support of Petitioners is filed on behalf of the American Humanist Association ("AHA") and Center For Inquiry ("CFI").

AHA has a long history of supporting equal rights for gay people. It remains committed to advancing equality for lesbian, gay, bisexual and transgender people and their families. AHA's LGBT Humanist Council seeks to improve the lives of LGBT individuals through education, public service and outreach, and serves as a resource for its members, the greater freethought community and the public on LGBT issues. Humanists celebrate the happiness brought into the lives of LGBT couples by their love for each other, and reject discrimination against gay people because it finds no basis in reason.

CFI's mission to promote the values of secular humanism in society leads directly to its firm belief that lesbian, gay, bisexual, and transgender individuals are entitled to the same civil rights and liberties as other Americans. They are also entitled to the same economic benefits. CFI has examined the issue of marriage for same-sex couples and has concluded that as long as the state recognizes and regulates intimate relationships through the institution of marriage, then marriage should be available for LGBT individuals just as it is for other Americans. CFI opposes bans on marriage equality as

---

[1] Respondents have given blanket permission to file this amicus brief; Petitioners have granted written consent to file this brief. Petitioners' letter of consent is attached herein. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission.

discriminatory, and believes they brand LGBT individuals as second-class citizens.

This case concerns core humanist and atheist interests regarding the equal, fair and just application of our laws to all of citizens and the separation of church and state.

SUMMARY OF ARGUMENT

This case, properly considered, is not merely about the civil institution of marriage and the right to build a committed and stable life with the one you love. Rather, it is about the denial of *any* civil right on the basis of discrimination in contravention of our most foundational constitutional values.

An application of these general principles resolves the particular cases before the Court. It violates the Equal Protection Clause to discriminate against same-sex couples, including denying them the fundamental right to marry. The purported state interests put forward to justify these discriminatory laws are illusory, having either no logical connection to the legislation or embodying an illegitimate interest, such as animus toward gay people or the promotion of discriminatory religious views. Indeed, because the First Amendment forbids any law solely grounded in or codifying a religious "moral" commandment, such "justifications" can be accorded no weight by this Court.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE REQUIRES STATES TO LICENSE A MARRIAGE BETWEEN SAME-SEX COUPLES.

It is a fundamental democratic ideal of the American republic, forged in the crucible of the Civil War and codified in the Fourteenth Amendment enacted in its wake, that "we are a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). The late date of this Court's decision in *Loving*, however, is telling. The promise of legal equality has all too frequently been empty for those groups deemed by some of the white, Christian majority to be alien, unworthy, abnormal or inferior.

It has been left to this Court to act as a bulwark against such majoritarian discrimination and to defend the Constitution's guarantees of liberty and equality for all. As this Court summarized in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943), our fundamental civil liberties and rights, including that to legal equality, must be "place[d] . . . beyond the reach of majorities and . . . establish[ed] . . . as legal principles to be applied by the courts. . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections."

The passage of the Fourteenth Amendment was a milestone in the long, unfinished struggle for equality in American society. Although it was racial slavery that was the issue at the forefront of the Civil War, the language of the Equal Protection Clause is not limited to preventing discrimination on the basis of race. It defends equality for all, forbidding the government to

"deny to *any* person . . . the equal protection of the laws." U.S. CONST. AMEND. XIV, §1 (emphasis added).

While Respondents may argue that recent cases give states protection from the Fourteenth Amendment in matters involving marriage, they ignore the obvious fact that such laws must comport with the Constitution. *See United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2691 (2013) ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons").

A. Laws that discriminate on the basis of sexual orientation create a suspect classification requiring strict judicial scrutiny.

The question in this case is not whether these laws discriminate on the basis of sexual orientation. They clearly do. *See, e.g.*, *Varnum v. Brien,* 763 N.W.2d 862, 884 (Iowa 2009) (stating that laws that ban recognition of "civil marriages between two people of the same sex classif[y] on the basis of sexual orientation"). Instead, the question is whether the government can justify such discrimination as a means to protect a sufficiently important governmental interest. It cannot.

In interpreting the Constitution's guarantee of legal equality, this Court has developed a jurisprudence that requires courts to subject to strict scrutiny any law that treats people differently on the basis of "suspect" classifications. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Governmental line-drawing that "likely . . . reflect[s] deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective" is suspect. *Id.* at n.14.

Amici support and endorse, and will not duplicate in their entirety here, Petitioners' arguments that discrimination against gay people is, upon application of this Court's precedents, suspect and therefore subject to heightened judicial scrutiny. Sexual orientation is a core element of personal identity and has no relationship to the ability to function or excel in society. *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 175 (2008). Gay people have suffered a history of unequal treatment motivated by outright bigotry. They represent a small proportion of the population and are in need of protection from hostile political majorities. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (plurality) (applying heightened scrutiny to gender classifications even though women constitute a majority of the populace). The very fact that this case is before the Court itself illustrates that gay people frequently have been unable politically to prevent the passage of discriminatory laws.

In view of the above, the Sixth Circuit gravely erred in applying mere rational basis review to the laws at issue. *DeBoer v. Snyder*, 772 F.3d 388, 405 (6th Cir. 2014) (applying rational basis).

B. Laws that impinge upon the fundamental right to marry must be subject to strict scrutiny.

There is a second basis for applying strict scrutiny to the laws challenged here: They impinge upon the fundamental right to marry.

It is apodictic that the Constitution recognizes a fundamental right to marry. *Loving*, 388 U.S. at 12; *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (stating that "[a]lthough *Loving* arose in the context of racial

discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals"); *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("the decision to marry is a fundamental right"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing "right . . . to marry"); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (marriage is "the most important relation in life").

This fundamental right does not depend upon the characteristics of the spouse. In *Loving*, "the Court defined the fundamental right as the right to marry, not the right to interracial marriage." *Golinski v. OPM*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012) (citing 388 U.S. at 12). In *Turner*, "the fundamental right was the right to marry, not the right to inmate marriage." *Id.* (citing 482 U.S. at 94-96). In *Zablocki*, "the fundamental right was the right to marry, not the right of people owing child support to marry." *Id.* (citing 434 U.S. at 383-86).

Petitioners here simply seek to participate equally in the *established* right to marry rather than seek a "new" fundamental right to "same-sex marriage." *See Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1215 (10th Cir. 2014); *Kerrigan*, 289 Conn. at 261-63. If "courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed." *Bostic*, 760 F.3d at 377. *Windsor* and *Lawrence v. Texas*, 539 U.S. 558 (2003), teach that "the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Id.* "In time, Americans will . . . refer to it simply as a marriage—not a same-

sex marriage." *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1163-64 (S.D. Ind. 2014).

Impairing a fundamental right violates the Fourteenth Amendment regardless of whether such impairment implicates a suspect class. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (stating that "equal protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right ***or*** operates to the peculiar disadvantage of a suspect class") (emphasis added); *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (applying strict scrutiny to a burden on a fundamental right on the basis of age).

Strict scrutiny is therefore warranted here independent of the level of scrutiny the Court accords sexual-orientation discrimination. In fact, a "'law that impinges upon a [fundamental right]'" is "'presumptively invalid, whether or not the law's purpose or *effect* is to create any classifications.'" *Plyler*, 457 U.S. at 231-32 (Blackmun, J., concurring) (emphasis added). Because these laws categorically prevent same-sex couples from marrying, they do more than merely "burden" the right to marry – they deprive them of the right completely. Such infringement of a fundamental right must be justified by the most compelling of governmental interests. No such compelling interest exists, *infra*.

C. There is no legitimate state interest, compelling or otherwise, that justifies the denial of same-sex couples the fundamental right to marry.

When a law discriminates among individuals on the basis of a suspect classification, or burdens a

fundamental right, the government must "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler*, 457 U.S. at 217.

In reviewing marriage equality bans, courts have been presented with a variety of post-hoc rationalizations by their defenders. Such purported "state interests" have included, *inter alia*, "furthering the [state's] interest in childrearing and responsible procreation," (*Perry v. Brown*, 671 F. 3d 1052, 1086 (9th Cir. 2012)), "proceeding with caution before altering the traditional definition of marriage," and "upholding tradition and morality." *DeBoer v. Snyder*, 973 F.Supp.2d 757, 777 (E.D. Mich. 2014).

None of these arguments can constitutionally justify such laws. Gay and heterosexual couples, married or unmarried, may both procreate (naturally or artificially) or adopt, or choose not to do so, or be infertile. Either may be good or poor parents, depending on their individual character and ability, rather than their sexual orientation. "[A]pproximately 150 sociological and psychological studies of children raised by same-sex couples have repeatedly confirmed . . . that there is simply no scientific basis to conclude that children raised in same-sex households fare worse than those raised in heterosexual households." *Id.* at 778. While courts have traditionally allowed lawmakers leeway to determine which factual argument they are to accept, this Court has also made clear that it must "find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) ("irrational prejudice" does not pass rational basis review).

Of all the purported state interests advanced in favor of the marriage bans, *supra*, the most obscure is the alleged "wait and see" justification adopted by the Sixth Circuit. Strangely, the Sixth Circuit found this "justification" particularly persuasive, writing: "To take another rational explanation for the decision of many States not to expand the definition of marriage, a State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries." *DeBoer*, 772 F.3d at 406.

The Sixth Circuit's "wait and see" approach is as fundamentally flawed as it is unprecedented; when constitutional rights are hindered there must be "prompt rectification." *Watson v Memphis*, 373 U.S. 526, 532-33 (1963). "The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly *compelling* reason, they are to be promptly fulfilled." *Id.* (emphasis added). "Were the Court to accept this position, 'it would turn the rational basis analysis into a toothless and perfunctory review' because 'the state can plead an interest in proceeding with caution in almost any setting.'" *DeBoer*, 973 F.Supp.2d at 782 (citation omitted).

Just as the "wait and see" approach is fundamentally flawed, so too is the "tradition and morality" justification. Courts have been virtually unanimous in concluding that "moral disapproval is not a sufficient rationale for upholding a provision of law on equal protection grounds." *Id.* at 782-83 (citations omitted). As the Massachusetts Supreme Judicial Court recognized in *Goodridge v. Dep't of Public Health*, 440 Mass. 309, 332 n.23 (2003), "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution

because that is what it historically has been." Indeed, as discussed in more detail *infra*, reliance on traditional, moral disapproval to uphold discriminatory laws against same-sex couples violates the Equal Protection Clause at its core. *See Heller*, 509 U.S. at 326 (the "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis.").

In short, the asserted state interests provide no logical justification for sustaining the marriage bans let alone a compelling one. They are instead illusory *post hoc* phantasms. We are left with those founded in religious interests, often in the guise of "morality" or "tradition," to which we now turn.

II. TRADITION AND RELIGIOUS MORALITY CANNOT BE USED TO JUSTIFY INVIDIOUS DISCRIMINATION AGAINST SAME-SEX COUPLES.

A. Religious morality and traditions are invalid state interests.

In developing and applying its equal protection jurisprudence, this Court has rightly cautioned against a reliance on history or tradition as a reason to uphold a discriminatory law. Such "justifications," as here, simply embody the very discrimination at issue. *See, e.g., Miss. Univ. Women v. Hogan*, 458 U.S. 718, 724-25 (1982) ("[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions").[2] Thus, in upholding the marriage bans based primarily on

---

[2] It is this history of discrimination against gay people that compels the Court to apply strict scrutiny, *supra*, rather than to uphold the laws at issue. *See Windsor*, 133 S. Ct. at 2689.

America's "tradition," rooted in religious morality of condemning gay people, *infra*, the Sixth Circuit's ruling contradicts this Court's Equal Protection jurisprudence, and stands in stark opposition to the very purpose of the Equal Protection Clause itself.

The Court's Equal Protection approach is sensible; after all, the foremost purpose in enacting the Fourteenth Amendment was to remedy the long history of deeply entrenched racial discrimination that stained American society from its earliest days. It was intended to force a new beginning, to change the law by repudiating long-standing norms of discrimination. Its broad language did not limit such change to protecting former slaves and their descendants, but guaranteed the right to equality to all.

Such traditional norms used to justify slavery took the form not only of discriminatory laws, but also of the Christian "moral" justifications for them. Consider, for example, the justifications that a Christian slaveholder found in his Bible. Leviticus 25:44-46 says that "you may buy male and female slaves from among the nations that are around you . . . and they may be your property." Once acquired, he could rely on Ephesians 6:5 to compel obedience with its command to slaves to "obey [their] earthly masters with fear and trembling, with a sincere heart, as [they] would Christ." As Jefferson Davis, president of the secessionist Confederate States of America, put it, "[s]lavery was established by the decree of Almighty God . . . It is sanctioned in the Bible, in both Testaments, from Genesis to Revelation."[3] Following the abolition of slavery itself, many Christian racists

---

[3] Mason I. Lowance, *A House Divided: The Antebellum Slavery Debates in America, 1776-1865*, 60 (2003).

continued to look to the Bible to justify enduring racial discrimination, citing the story in Genesis 9:25 of the "mark of Cain" for their view that dark-skinned peoples are cursed by God, and therefore must be treated as inferiors.

Religious, in particular Christian, faith was at the forefront of the defense of segregation and the bans on interracial marriage. In 1967, 16 states including Virginia banned such marriages with penalties. Mr. and Mrs. Loving, an interracial couple from Virginia, married in the District of Columbia and returned to their home state. *Loving*, 388 U.S. at 2. They were arrested and charged with violation of the law. Sentenced to a year in prison, the judge offered to suspend the sentence for 25 years in exchange for the Lovings leaving Virginia, a modern, self-imposed exile. *Id.* at 3. The statute banning interracial marriage was upheld by the state court, including one of the most famous expressions of religious based racial discrimination in American history:

> 'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'

Id. (citing the trial judge's ruling).

Loving was far from the first time where a judge criticized interracial relationships based on an explicitly Biblical morality. In reversing a lower court decision awarding damages to a non-white passenger who was removed from a train when she refused to move seats, the court in *West Chester & P.R. Co. v.*

Miles, 55 Pa. 209, 213 (Pa. 1867) upheld the right to segregate, noting that:

> Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them.

Churches, in particular many Southern Protestant churches, also defended segregation and bans on interracial marriage. Bob Jones University, a non-denominational Protestant university in South Carolina fought a case all the way to the Supreme Court, unsuccessfully maintaining that the Internal Revenue Service could not use the university's ban on interracial relationships to deny it tax exemption. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). The university's claim was that the discriminatory rules were part of the school's divine mission. *Id.* at 580-81. In a 1960 radio address, the school's founder, Bob Jones, Sr., a preacher, stated:

> All men, to whatever race they may belong, have immortal souls; but all men have mortal bodies, and God fixed the boundaries of the races of the world. Let me repeat, it is no accident that most of the Chinese live in China. It is not an accident that most Japanese live in Japan; and the Africans should have been left in Africa, and the

> Gospel should have been taken to them as God commanded His people to do.[4]

Another famous Protestant preacher, the Reverend Jerry Falwell, was horrified by the Supreme Court's mandating desegregation in public education, blaming it on "Chief Justice Warren's failure to know and follow God's word." Michael Curtis, *A Unique Religious Exemption From Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those who Discriminate Against Married or Marrying Gays in Context*, 188 WAKE FOREST L. REV. 173, 188 (2012).

Senior politicians also trumpeted their belief in segregation and purity of the races in terms of religious faith. On the Senate floor, Senator Robert Byrd cited Genesis, Leviticus and the Gospel according to Matthew to oppose the 1964 Civil Rights Act, which banned racial discrimination in public accommodations. *Id.* at 188, n.71. Senator Bilbo of Mississippi placed his opposition to desegregation and interracial marriage, asserting, "miscegenation and amalgamation are sins of man in direct defiance with the will of God." *Id.* at 189-90. Mississippi's governor, Ross Barnett, is reported as proudly announcing, "God was the original segregationist."[5] Even charitable organizations such as the Daughters of the American

---

[4] Bob Jones Senior, *Is Segregation Scriptural?*, Radio Address at Bob Jones University, Apr. 17, 1960 at 13-14, *available at* https://docs.google.com/a/centerforinquiry.net/file/d/0B6A7PtfmRgT7Q1kzZEVXUThMLWc/edit (last visited Feb. 24, 2015).

[5] *Ross Barnett, Segregationist, Dies; Governor of Mississippi in 1960's*, N.Y. Times, Nov. 7, 1987, *available at* http://www.nytimescom/1987/11/07/obituaries/ross-barnett-segregationist-dies-governor-of-mississippi-in-1960-s.html (last visited Feb. 24, 2015).

Revolution chimed in, announcing "racial integrity [was a] fundamental Christian principle." Curtis, *A Unique Religious Exemption*, at 190.

Racial discrimination is in no way unique in finding its justification in long-standing history and traditional religious views. Opponents of equal rights for women could point to 1 Timothy 2:12, which said "suffer not a woman to teach, nor to usurp authority over the man, but to be in silence."

Religious morality was also a driving force behind discriminatory treatment of women *within* marriage. Wives were, for much of U.S. history, prevented from owning property, and could only obtain divorces on extremely restrictive grounds. "Opposition to divorce remained widespread among American churches in the second half of the nineteenth century (especially in the absence of adultery)." Jill Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1468 (2000). The Catholic Church and all major Protestant denominations joined the anti-liberalization National Divorce Reform League as charter members; and the Presbyterian Church held moves towards easier divorce in the states to be "in direct contravention of the law of God." *Id.* at 1468 n.33 (citation omitted). The final state to permit no-fault divorce was New York, which did not pass such legislation until 2010. Once again, the most vocal opponents of no-fault divorce included religious groups. The New York State Catholic conference, continuing to uphold the Vatican's policy against divorce, released a statement saying "[w]e urge the state Assembly to reject this proposal, and failing that,

we call on Gov. Paterson to veto it."[6] In the words of a column in the Christian Post, "[w]hat must be understood by Christians is that no-fault divorce functions as a direct enemy of the gospel of the kingdom."[7]

Laws prohibiting same-sex couples from marrying are undoubtedly motivated by religious bias, founded in Christian "morality" as well. Opponents of equal legal rights for gay people frequently ground their position in what they say are the moral commands of their religion. Many cite the story of Sodom and Gomorrah (found in Genesis 19:1-11) or Leviticus 20:13, which calls for the execution of those who engage in gay sex, saying that "[i]f a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death; their blood is upon them."[8]

---

[6] Gary Stern, *Two Christian Groups Oppose No-Fault Divorce*, The Journal News, June 17, 2010, *available at* http://religion.lohudblogs.com/2010/06/17/two-christian-groups-oppose-no-fault-divorce/ (last visited Feb. 24, 2015).

[7] S. Michael Craven, *No-Fault Divorce is Institutionalized Evil*, Christian Post Sept. 11, 2009, available at http://www.christianpost.com/news/no-fault-divorce-is-institutionalized-evil-40822/ (last visited Feb, 24, 2015).

[8] Of course, not all Christians read these portions of the Bible as compelling them to discriminate against African Americans, women and gay people, but it is clear that large portions of the Christian-majority electorate have voted to discriminate on the basis of sexual orientation in approving the myriad of anti-marriage equality measures enacted in the first decade of this century, often as constitutional amendments requiring a super majority vote. That many Christian and other religious groups now and historically oppose such discrimination only strengthens the unconstitutionality of relying on such religious opposition as a justification for discrimination. The

The religious nature of the opposition to marriage equality is apparent to this day. When the list of *amici* briefs submitted to the Sixth Circuit defending the states' proscriptions of same sex marriage is examined, it can be seen that brief after brief was filed by religious groups. These groups included: (1) The Family Research Council, whose mission is "to advance faith, family and freedom . . . from a Christian worldview;"[9] (2) The Becket Fund for Religious Liberty; (3) the U.S. Conference of Catholic Bishops; (4) the National Association of Evangelicals; (5) the Church of Jesus Christ of the Latter-Day Saints; and (5) the Coalition of Black Pastors, amongst many other religious groups. These briefs were not shy in stating the source of the tradition to be invoked when seeking to restrict marriage rights to same-sex couples: Christianity.

For example, *amici* The Coalition of Black Pastors noted that they were duty bound to "oppose any idea, law, rule or suggestion that is contrary to the teachings of the Bible." Brief for the Coalition of Black Pastors From Detroit, Outstate Michigan, and Ohio as Amici Curiae at 2, *DeBoer*, 772 F.3d 388. The District Court's decision was to be overturned because it "supplant[ed] the tried and true morality of the Judeo-Christian tradition upon which our country was

---

Establishment Clause "mandates government neutrality between religion and religion, and religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Accepting the religious dogma of those groups, which oppose marriage equality rights while denying that of those who support, violates this core provision of the Constitution.

[9] Family Research Council, Vision and Mission Statements, available at http://www.frc.org/mission-statement (last visited March 2, 2015)

founded with the trendy, relativist morality of political correctness." *Id.* at 21. The joint brief by The National Association of Evangelicals based its support for excluding gay people from marriage by noting that the "respective religious doctrines hold that marriage between a man and a woman is sanctioned by God as the right and best setting for the raising of children." Brief for the National Coalition of Evangelicals *et al.* as *Amici Curiae* at 3, *DeBoer*, 772 F.3d 388. These beliefs derive from amici's "marriage affirming religious beliefs." *Id.* at 5.

Opposition outside of official briefs is explicit in linking marriage equality bans to specific interpretations of Christianity. When a court in Alabama struck down that state's ban on marriage for same-sex couples, *Searcy v. Strange*, 2015 U.S. Dist Lexis 7776 (S.D. Al. Jan. 23, 2015), Alabama's Chief Justice issued an order to probate judges that they should not issue marriage licenses to same-sex couples.[10] In justification for this, he looked firmly to his religious views, noting that "[t]his power over marriage, *which came from God under our organic law*, is not to be redefined by the United States Supreme Court or any federal court."[11]

---

[10] Alan Blinder, *Alabama Judge Defies Gay Marriage Law*, N.Y. Times, Feb. 8, 2015, *available at* http://www.nytimes.com/2015/02/09/us/gay-marriage-set-to-begin-in-alabama-amid-protest.html?_r=0 (last visited Feb 26, 2015).

[11] David Edwards, *Roy Moore: If Supreme Court changes God's 'Organic Law' on marriage 'I would not be bound thereby,'* Feb, 15, 2015, *available at* http://www.rawstory.com/rs/2015/02/roy-moore-if-supreme-court-changes-gods-organic-law-on-marriage-i-would-not-be-bound-thereby (last visited Feb. 24, 2015) (emphasis added).

Speaking in Iowa, ex-Senator Rick Santorum, a leading candidate for the Republican Presidential nomination in 2012, observed that "God who gave us rights also gave us a responsibility and laws by which our civil laws have to comport with. A higher law. God's law."[12]

The Sixth Circuit acknowledged, and indeed embraced, the religious motivation underlying the marriage bans by beginning its discussion with a citation to *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), where the court declared: "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend." *DeBoer*, 772 F.3d at 400.

This Court has also recognized the religious animus underlying discrimination against gay people, observing: "for centuries there have been powerful voices to condemn homosexual conduct as immoral . . . shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Lawrence*, 539 U.S. at 571. But unlike the Sixth Circuit, this Court ruled that "[t]hese considerations do not answer the question before us, however . . . [which is] whether the majority may use the power of the State to enforce these views on the whole society." *Id.* Rejecting lawmaking grounded in religious moral

---

[12] LGBTQNation Staff Reports: *Civil laws on same-sex marriage must comport with God's law*, Nov. 5, 2011, *available at* http://www.lgbtqnation.com/2011/11/santorum-civil-laws-on-same-sex-marriage-must-comport-with-gods-law/ (last visited Feb, 24, 2015).

commands, the Court declared that its "obligation is to define the liberty of all, not to mandate our own moral code." *Id.*

In soundly overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), this Court condemned *Bower's* misguided reliance on "the history of Western civilization and Judeo-Christian moral and ethical standards." *Lawrence*, 539 U.S. at 572. It advised courts to look forward, just as the authors of the Fourteenth Amendment did, who "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id.* at 579. Rather than bowing to a "history and tradition" of legal discrimination against gay people, the new, more inclusive direction of "our laws and traditions in the past half century are of most relevance here." *Id.* at 571-72.

Lawrence reaffirmed that this Court has "*never* held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.* at 582 (O'Connor, J., concurring) (emphasis added). *Bowers*, the sole outlier, "was not correct when it was decided, and it is not correct today." *Id.* at 578. Consequently, "[m]oral disapproval of [a] group . . . is an interest that is insufficient to satisfy [even] rational basis review[.]" *Id.* at 582 (O'Connor, J., concurring) (citations omitted). *See also Kerrigan*, 289 Conn. at 256-57 (same). The Sixth Circuit therefore erred as a matter of law in sustaining the marriage bans on such grounds, even under rational basis review.

B. Preventing harm may be a moral value, but it is the prevention of harm itself that is a proper motivation for legislation, not any underlying religious morality.

Opponents of marriage equality point to the *Lawrence* dissent's suggestion that, if morality is an insufficient state interest, a number of state laws would be "called into question." 539 U.S. at 590 (Scalia, J., dissenting) (referring to "laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity"). Even putting aside the repulsive calumny inherent in lumping together marriage equality with bestiality and incest, a careful review of each instance in which this Court has considered such laws reveals that morality has never stood alone as justification for them. In every instance, the decision relied on the state interest in preventing *concrete* harms of the prohibited conduct and not on a bare assertion of immorality. *See Crowley v. Christensen*, 137 U.S. 86, 91 (1890) (alcohol leads to "neglect of business and waste of property" and is associated with crime and misery); *Phalen v. Commonwealth of Virginia*, 49 U.S. 163, 168 (1850) (lotteries harm the poor and ignorant); *Posadas de Puerto Rice Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986) (restrictions on lotteries protect the health, safety, and welfare of citizens).[13]

---

[13] Even in considering bans on polygamy and bigamy, the Court has always cited to the alleged harm that such practices cause, rather than pure moral arguments. *See Estin v. Estin*, 334 U.S. 541, 546 (1948) (protecting children); *Davis v. Beason*, 133 U.S. 333, 341 (1890) (degrading women and debasing men). As the Sixth Circuit noted: "If it is constitutionally irrational to stand

This same can be said of this Court's decisions regarding sexual speech. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (rejecting reliance on an asserted "government interest in protecting . . . morality" and instead relying on the secondary effects doctrine); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (upholding statute as a means to "prevent crime, protect the city's retail trade, maintain property values, and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life"); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976) (upholding ordinance based on city's interest in preventing crime and prostitution as a "secondary effect").

Similarly, in cases involving supposedly obscene or offensive speech, the Court has refused to rest its reasoning on morality alone. *See Cohen v. California*, 403 U.S. 15, 22-23 (1971) (rejecting an asserted right of "States, acting as guardians of public morality, [to] properly remove [an] offensive word from the public vocabulary"). *See also Bethel School Dis. No. 403 v. Fraser*, 478 U.S. 675, 683-86 (1986) (upholding the suspension of a high school student for a sexually explicit speech, but only after describing the harm it caused to young students, *viz.* the speech "would undermine the school's basic educational mission").

Opponents have further argued that if morality is not a basis for legislation, laws such as those setting a

---

by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage." *DeBoer*, 772 F. 3d at 411. This may indeed be true, if the only rationale for such bans are limited to tradition and moral disaproval.

minimum wage, establishing legal and medical ethics codes, or forbidding discrimination or animal cruelty would all be left without a sufficient justification to survive rational basis review. These laws, of course, are all justified by an interest in seeking to prevent harm to or promote the welfare of those in need of protection. While preventing harm may be a moral value, it is the prevention of harm itself that is a proper motivation for legislation, not any moral consideration behind it. Concern for *concrete* effects removes such justifications from the same category as the empty "morality" of mere disapproval grounded in repugnance and nothing more.

All that is left to its defenders is a moral argument that gay people are sinful and therefore not to be permitted to share the institution of marriage with other Americans. This kind of spiteful, self-righteous "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534(1973). Accordingly, these laws do not satisfy the judicial scrutiny required to sustain them.

C. The Sixth Circuit's reliance on Town of Greece is misplaced, as legislative prayer is a sui generis category of Establishment Clause jurisprudence that has no applicability to other situations.

The Sixth Circuit justifies the use of religious tradition to uphold the discriminatory laws at issue here by relying largely on *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818-20 (2014). Insisting on viewing this case through a narrow historical lens, the Sixth Circuit wrote:

> Nobody in this case, however, argues that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage. Tradition reinforces the point. . . . In one case, the Court held that the customary practice of opening legislative meetings with prayer alone proves the constitutional permissibility of legislative prayer, quite apart from how that practice might fare under the most up-to-date Establishment Clause test.

DeBoer, 772 F.3d at 403-04 (citing *Town of Greece*). However, *Town of Greece* is completely inapposite and its rationale cannot be used to support other practices challenged under the Establishment Clause let alone discriminatory practices challenged under the Equal Protection Clause.

The Establishment Clause of the "First Amendment has erected a wall between church and state" and this "wall must be kept high and impregnable." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947). It "mandates that the government remain secular." *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). This means, *inter alia*, that the government must "not promote or affiliate itself with any religious doctrine or organization," and must "'not favor religious belief over disbelief.'" *Id.* at 590-93 (citation omitted). Indeed, there is a "'myriad [of] subtle ways in which Establishment Clause values can be eroded.'" *Id.* at 591 (citation omitted). In *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971), the Court synthesized these principles into what is now known as the "*Lemon* test," which has "been applied regularly in the Court's later Establishment Clause cases." *Allegheny*, 492 U.S. at 592. Pursuant to the *Lemon* test, government action

must have a (1) secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster an excessive entanglement with religion. *Id.* at 612.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), and more recently, in *Town of Greece*, this Court eschewed applying the *Lemon* test to legislative prayer, understanding that doing so would result in the inescapable conclusion that the practice is unconstitutional. *See Snyder v. Murray City Corp.*, 159 F.3d 1227, 1232 (10th Cir. 1998) ("the kind of legislative prayers at issue in *Marsh* simply would not have survived the traditional Establishment Clause tests that the Court had relied on prior to *Marsh* and . . . since *Marsh*"); *Marsh*, 463 U.S. at 800-01 (Brennan, J., dissenting, with Marshall J., joining) ("if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."). As correctly pointed out by Justice Brennan, "if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause." *Id.* at 796. The majority did not dispute this contention. *See Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 281 (4th Cir. 2005).

As a result, the courts, including this Court, have described *Marsh* as an "exception" to *Lemon*. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 583, n.4 (1987) ("The *Lemon* test has been applied in all cases since its adoption in 1971, ***except*** in *Marsh*"); *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 590 (11th Cir. 2013) (the "Supreme Court has not extended the *Marsh* ***exception***"); *Joyner v. Forsyth County*, 653 F.3d 341, 349 (4th Cir. 2011) ("'the ***exception*** created

by *Marsh* is limited'") (citation omitted); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 259, 275 (3d Cir. 2011) (where the issue was "whether a school board may claim the ***exception*** established for legislative bodies in *Marsh*, or whether the traditional Establishment Clause principles . . . apply" the court concluded that "*Marsh's* legislative prayer ***exception*** does not apply"); *Card v. City of Everett,* 520 F.3d 1009, 1014 (9th Cir. 2008) (*Marsh* is "construed as carving out an ***exception*** to normal Establishment Clause jurisprudence.") (internal quotation omitted); *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1276 (11th Cir. 2008) ("the Supreme Court has never expanded the *Marsh* ***exception***"); *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 376, 379 (6th Cir. 1999) ("the unique and narrow ***exception*** articulated in *Marsh*"); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 829, n.9 (11th Cir. 1989) ("*Marsh* created an ***exception*** to the *Lemon* test only for such historical practice."); *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985) (*Marsh* is an "**exception**" to *Lemon*); *Weisman v. Lee*, 908 F.2d 1090, 1094-96 (1st Cir. 1990) (Bownes, J., concurring) (same); *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823, 835 (E.D. La. 2009) (*Marsh* is "a narrow ***exception***"); *Bats v. Cobb Cnty.*, 410 F. Supp. 2d 1324, 1328 (N.D. Ga. 2006) (same); *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002) (same); *Wynne v. Town of Great Falls*, 2003 U.S. Dist. LEXIS 21009, *10 (D.S.C. 2003) (*Marsh* is an "***exception*** in Establishment Clause law"); *Metzl v. Leininger*, 850 F. Supp. 740, 744 (N.D. Ill. 1994) ("*Marsh* court's narrow 'historical ***exception***' to traditional Establishment Clause jurisprudence."); *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682, 688 (D. Utah 1991) (*Marsh* is an "**exception**"); *Lundberg v. West Monona Comm. Sch.*

Dist., 731 F. Supp. 331, 346 (N.D. Iowa 1989) (same); *Jewish War Veterans v. United States*, 695 F. Supp. 3, 11, n.4 (D.D.C. 1988) ("[t]he Supreme Court has applied the *Lemon* framework in all but one establishment clause case. The ***exception*** was *Marsh*."); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 142, n. 38 (N.D.N.Y 1988) (the "*Lemon* test has been applied by the Supreme Court in all cases subsequent to its formulation with one exception. In *Marsh* . . . the Court carved out a narrow ***exception*** to the prohibitions of the establishment clause"); *cf. Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) ("the Court is carving out an ***exception*** to the Establishment Clause.") (Emphasis added in each). Some of the foregoing cases explicitly referred to *Marsh* as an exception to the *Establishment Clause* itself.[14]

Other courts discussing *Marsh* have highlighted its *sui generis* and one-of-a-kind nature, thereby affirming that *Marsh* is inconsistent with Establishment Clause jurisprudence. *See, e.g.*, *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 n.10 (2005) (describing *Marsh* as a "special instance"); *Rubin v. City of Lancaster*, 710 F.3d 1087, 1091, n.4 (9th Cir. 2013) (since "*Marsh*, legislative prayer has enjoyed a 'sui generis status' in Establishment Clause jurisprudence."); *Simpson*, 404 F.3d at 281 ("*Marsh*, in short, has made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines."); *Coles*, 171 F.3d at 381 ("*Marsh* is one-of-a-kind"); *Snyder*, 159 F.3d at 1232 ("the constitutionality of legislative prayers is a sui

---

[14] *See, e.g., Indian River Sch. Dist.*, 653 F.3d at 259, 275; *Card*, 520 F.3d at 1014; *Wynne*, 2003 U.S. Dist. LEXIS 21009, *10; *Metzl*, 850 F. Supp. at 744; *Blackwelder*, 689 F. Supp. at 142, n. 38.

generis legal question"); *Jones v. Hamilton Cnty.*, 891 F. Supp. 2d 870, 885 (D. Tenn. 2012) (same); *Graham v. Central Comm. Sch. Dist.*, 608 F. Supp. 531, 535 (S.D. Iowa 1985) ("*Marsh* decision is a singular Establishment Clause decision.").

Marsh is not only inconsistent with decades of Establishment Clause jurisprudence preceding it, but also with subsequent jurisprudence. *See, e.g.*, *Santa Fe v. Doe*, 530 U.S. 290, 313 (2000) (student-led prayer at public school football games unconstitutional); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (public school graduation prayers unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (public school prayers unconstitutional). *See also Wynne v. Town of Great Falls*, 376 F.3d 292, 302 (4th Cir. 2004) ("in the more than twenty years since *Marsh*, the Court has never found its analysis applicable to any other circumstances; rather, the Court has twice specifically refused to extend the *Marsh* approach to other situations."); *Jewish War Veterans*, 695 F. Supp. at 11, n.4 ("[t]he Court returned to the *Lemon* test in cases decided after *Marsh*."). Taking this Court's lead, lower courts have properly refused to apply or extend *Marsh* to situations other than legislative prayer.[15]

---

[15] *See, e.g.*, *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 494-95 (6th Cir. 2004) (declining to apply *Marsh* in ruling that judge's Ten Commandments display violated Establishment Clause); *Glassroth v. Moore*, 335 F.3d 1282, 1298 (11th Cir. 2003) (same); *North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147-49 (4th Cir. 1991) (*Marsh* inapplicable to judicial prayers); *Mellen v. Bunting*, 327 F.3d 355, 368-69 (4th Cir. 2003) (*Marsh* inapplicable to prayers by military officials); *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068, 1076 (2d Cir. 1997) (refusing to apply *Marsh* to compulsory A.A. program); *Cammack v. Waihee*, 932 F.2d 765, 772 (9th Cir. 1991) (refusing to apply *Marsh* to Good Friday holiday); *Jager v.*

Because this Court was, in essence, carving out an exception from the Establishment Clause for the narrow issue of legislative prayer, this Court in both *Marsh* and *Town of Greece* was careful to make clear that the rationale for the exception is inapplicable to other areas of Establishment Clause law. *See Town of Greece*, 134 S. Ct. at 1820 (noting the exception's "***limited context***") (emphasis added). As the legislative prayer exception is completely inapplicable to other areas of Establishment Clause law, it is, *a fortiori*, inapplicable to Equal Protection law, which is designed to rectify, rather than perpetuate, discriminatory historical practices.

Moreover, in addition to being inconsistent with the Establishment Clause, *Marsh* is also premised on dangerous logic; in fact, it is the same dangerous logic adopted by the Sixth Circuit. The analysis in the short ten page opinion only goes as far as, "[t]he founders did it. Everyone since them has done it. No one is abusing it. Therefore it is constitutional." Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 Cal. L. Rev. 293, 338 (1993). This "logic" would uphold anti-miscegenation laws, *Loving*, 388 U.S. 1, racial segregation, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and even slavery, *Scott v. Sandford*, 60 U.S. 393 (1857). *Marsh*'s logic would permit women to be denied the right to vote and practice law, among many other rights now secured to them. This is precisely why the reliance on tradition

---

Douglas Cnty. Sch. Dist., 862 F.2d 824, 828 (11th Cir. 1989) (*Marsh* "has no application to" school prayers); *Carter v. Broadlawns Medical Center*, 857 F.2d 448, 453 (8th Cir. 1988) (declining to extend *Marsh* to hospital chaplaincy program).

central to *Marsh* and *Town of Greece* is so confined by this Court to the specific arena of legislative prayer.

Just as history cannot justify discriminatory laws under the Equal Protection Clause, it cannot, and should not, justify governmental practices that promote religion. *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring). This Court later acknowledged the pernicious nature of the *Marsh*-historical justification, asserting that it could "gut the core of the Establishment Clause," reasoning:

> The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically . . . but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.

Id. at 603-05. In an earlier Establishment Clause case, the Court emphasized: "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970).

In accord with this Court's decisions, many courts have rejected history as a basis for upholding government-sponsored religious displays.[16] For instance,

---

[16] *See, e.g.*, *Trunk v. City of San Diego*, 629 F.3d 1099, 1108 (9th Cir. 2011) (cross unconstitutional despite "historical significance."); *Carpenter v. City & Cnty. of San Francisco*, 93 F.3d 627, 631-32 (9th Cir. 1996); *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995) (despite claim that cross on seal "symbolizes 'the unique history and heritage of [the city]" it violated Establishment Clause); *Ellis v. La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993); *Harris v. Zion*, 927 F.2d 1401, 1414-15 (7th Cir. 1991); *Friedman v. Board of Cnty. Commissioners*, 781 F.2d 777, 781-82 (10th Cir. 1985); *ACLU v. Rabun Cnty. Chamber of*

the Eleventh Circuit held that a judge's Ten Commandments display was unconstitutional, reasoning: "That there were some government acknowledgments of God at the time of this country's founding and indeed are some today, however, does not justify under the Establishment Clause a 5280-pound granite [religious] monument." *Glassroth*, 335 F.3d at 1298.

The Seventh Circuit similarly rejected a town's argument that "the duration of its [crucifix] display reinforces its secular effect," declaring: "We do not accept this sort of bootstrapping argument as a defense to an Establishment Clause violation, nor have we found any other case that adopted this reasoning." *Gonzales v. North Township of Lake Cnty.*, 4 F.3d 1412, 1422 (7th Cir. 1993). It reiterated in *Pitts v. City of Kankakee*, 267 F.3d 592, 596 (7th Cir. 2001):

> In a predominantly Christian community, it may take a Buddhist, or a Moslem, or a Jew, or an atheist, to call to the authorities' attention a possible violation of the Establishment Clause. The rights of such citizens do not expire simply because a monument has been comfortably unchallenged for twenty years, or fifty years, or a hundred years.

The longstanding nature of a religious practice, in fact, exacerbates the constitutional injury because "religious outsiders [must] tolerate these practices . . .

Commerce, Inc., 698 F.2d 1098, 1111 (11th Cir. 1983); *Washegesic v. Bloomingdale Pub. Sch.*, 813 F. Supp. 559, 563, n.9 (W.D. Mich. 1993), *aff'd* 33 F.3d 679 (6th Cir. 1994) ("[t]his Court's analysis does not depend upon the length of time the picture [of Jesus] has hung on the school wall.").

with the awareness that those who share their religious beliefs have endured these practices for generations." Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2164 (1996). *See also Ellis*, 990 F.2d at 1525 ("If anything, such facts underscore the formidable nature of the display and increase the likelihood of an impermissible appearance of religious preference.").

Nevertheless, whatever limited role history has played in Establishment Clause legislative prayer jurisprudence, *supra*, it simply has no place, whatsoever, in justifying discriminatory laws under the Equal Protection Clause. *E.g.*, *Lawrence*, 539 U.S. at 577; *Brown*, 347 U.S. at 490; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 n.15 (1994) ("the total exclusion of women from juries," is "now unconstitutional even though [it] once coexisted with the Equal Protection Clause."). Insofar as the Sixth Circuit relied on religious history and the narrow *Marsh* exception upheld in *Town of Greece* to sustain the marriage bans, it is in error as a matter of well-settled law.

III. THE FOURTEENTH AMENDMENT REQUIRES STATES TO RECOGNIZE A MARRIAGE BETWEEN SAME-SEX COUPLES LAWFULLY LICENSED OUT-OF-STATE.

Though the arguments, *supra*, have clarified that the Fourteenth Amendment requires states to license a marriage between same-sex couples; if the Court decides otherwise, such states must still recognize a marriage that was lawfully licensed and performed out-of-state.

Much like the Defense of Marriage Act, the state laws at issue here remove a "dignity and status of immense import" when they refuse to recognize marriages performed out-of-state. *Windsor*, 133 S. Ct. at 2681. In effect, they violate the Fourteenth Amendment by making and enforcing laws that "abridge the privileges . . . of citizens of the United States." U.S. Const. Art. IV, Sec. 2. This Court has found that the "privileges and immunities" are "those rights which are fundamental" such as the right to marriage. *Slaughter-House Cases,* 83 U.S. 36 (1873). The Clause "protects against more than just state discrimination, and in fact establishes a minimum baseline of rights for all American citizens." *McDonald v. Chicago,* 561 U.S. 742, 838 (2010) (Thomas, J.).

Marriage is a fundamental right of every citizen, *supra*. And a lawful marriage is related to over a thousand federal rights and responsibilities. *See* GAO, D. Shah, *Defense of Marriage Act: Update to Prior Report 1* (GAO–04–353R, 2004). "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights . . . to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). The time has long since come for this Court to reject any law that codifies ancient religious bigotry against gay persons. The Fourteenth Amendment ensures that personal and societal biases, not based in fact nor designed to stop any real harm, do not continue to unconstitutionally bind those that the majority may feel are too "other," too outside their own view of how one should speak, live, and love.

CONCLUSION

Whether the love of a man for another man or a woman for another woman should be labeled morally repugnant, or is instead to be celebrated for the joy it brings into their lives, is not before the Court. This Court does not, and cannot, decide issues of religion or its morality. The Court is instead presented with a much different question: whether legislation may be used as a sword to deny the basic humanity and fundamental rights of gay people, or whether the Constitution acts as a shield, protecting such individuals from the codification of deeply ingrained social bias against them. The answer is clear: our Constitution requires that our laws require equal protection for all and forbids the government from creating second-class citizens. There being no legitimate bases for the discriminatory laws denying same-sex couples the fundamental right to marry, they must be struck down.

For the foregoing reasons, *Amici Curiae* request that the judgment of the United States Court of Appeals for the Sixth Circuit be reversed.

Respectfully submitted,

MONICA L. MILLER
AMERICAN HUMANIST ASSOCIATION
1777 T Street N.W.
Washington, D.C. 20009
(202) 238-9088
mmiller@americanhumanist.org

DAVID A NIOSE
AMERICAN HUMANIST ASSOCIATION
1777 T Street N.W.
Washington, D.C. 20009
(202) 238-9088
dniose@americanhumanist.org

ELIZABETH L. HILEMAN
Counsel of Record
HILEMAN & ASSOCIATES, P.C
7979 Old Georgetown Rd, #600
Bethesda, Maryland 20814
(301) 652-1448
ehileman@hilemanlaw.com

EDWARD TABASH
CENTER FOR INQUIRY
433 North Camden Drive, Suite 600
Beverly Hills, CA 90210
(310) 279-5120
etabash@centerforinquiry.net

NICHOLAS LITTLE
CENTER FOR INQUIRY
1020 19th St. NW, Suite 425
Washington, DC 20036
(202) 629-2403
nlittle@centerforinquiry.net

Attorneys for Amici Curiae

March 5, 2015

APPENDIX

APPENDIX A

IDENTIFICATION OF AMICI CURIAE

The American Humanist Association ("AHA") is a national nonprofit organization with over 414,000 supporters and members across the country. AHA is dedicated to advocating progressive values and equality for humanists, atheists, and freethinkers. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 180 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The mission of the AHA is to promote the spread of humanism, raise public awareness and acceptance of humanism and encourage the continued refinement of the humanist philosophy.

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to promoting and defending reason, science, freedom of inquiry, and humanist values and represents over 50,000 members. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.